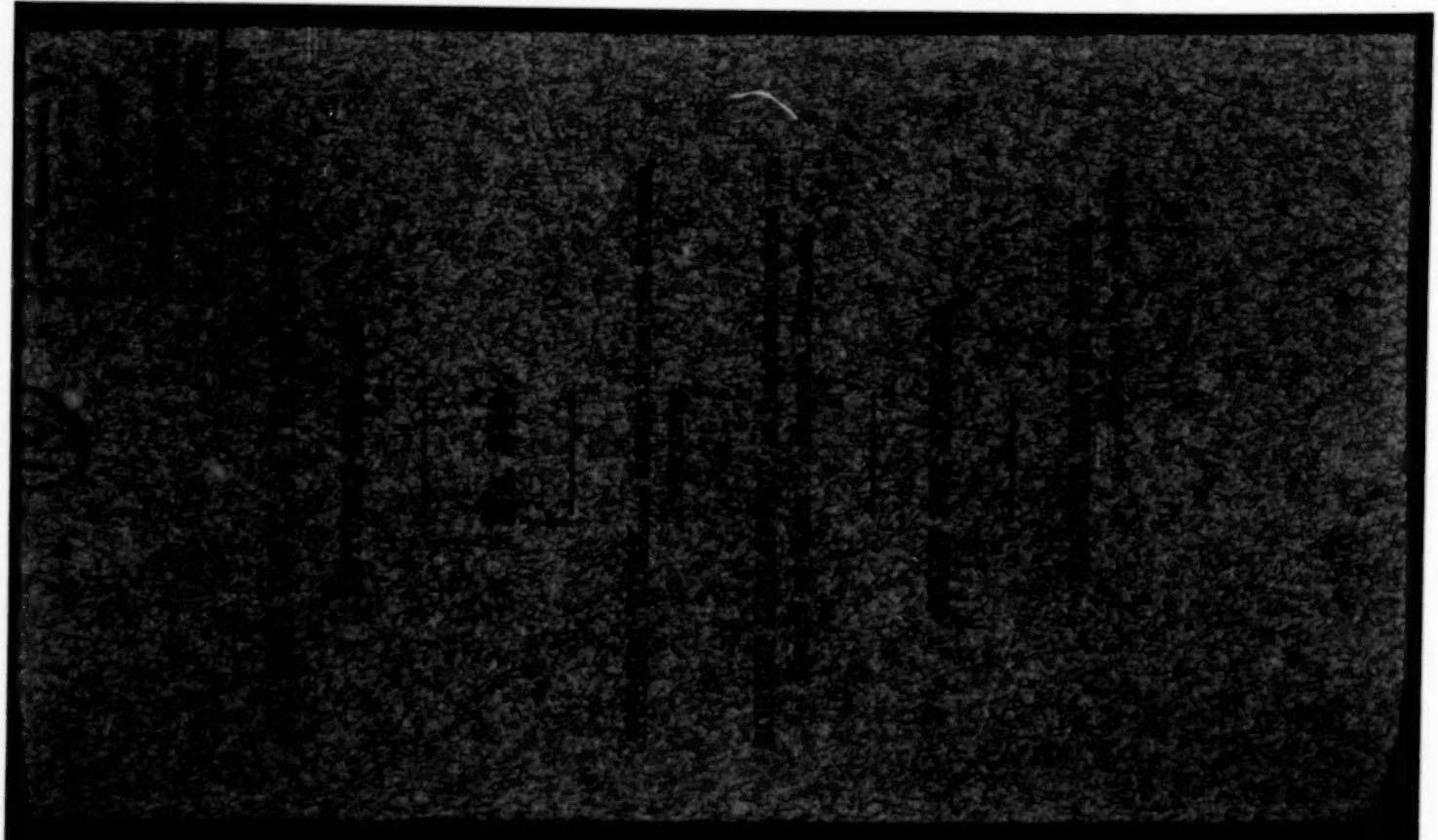


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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 344

HUBERT WORK, AS SECRETARY OF THE INTERIOR, PETITIONER,

vs.

ROBERT I. BRAFFET, AS ADMINISTRATOR OF THE ESTATE OF MARK P. BRAFFET, DECEASED, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above-named appellee respectfully submits the matter following for his answer to appellant's application for *certiorari* herein. Its length is necessitated

by reason of the many wholly erroneous propositions submitted by the appellant.

In view of the recital of facts in the decision of the learned Court of Appeals (R., 17), but slight further statement will be necessary. In the bill it was alleged that Braffet applied to purchase, pursuant to Section 2347, Revised Statutes, known coal lands, and *known as such* on date of admission of Utah into the Union, not otherwise appropriated or reserved under the laws of the United States, etc. (par. 3 of bill, R., p. 2).

The allegation that the land was known coal land, and known as such on admission day, was not denied and stands fully admitted, the defendant, appellant, simply contending that it was not vacant coal land by reason (Answer, par. 12, R., p. 7), *arguendo*, it had been returned as nonmineral by the surveyor, and therefore presumably had passed to Utah under its school land grant, notwithstanding mineral land was excepted from the operation of the grant. That was the only issue in the case, *i. e.*, the appellant contending that the illegal claim of Utah was an entry of record in the local land office and, until it was canceled on the records of the local land office, the operation of the statute, Section 2347, Revised Statutes, was suspended by the regulations of the land office, and the right by a competent person to purchase coal lands, *i. e.*, mineral school sections, thereunder was precluded.

"*Known as such on date of admission of Utah* into the Union" is our basic allegation, one necessary to the maintenance of our suit. Therefore we submit that

the admission carries our suit, so far as any contention of appellant is concerned, that the land was not known coal land on admission day and is wholly in line with appellant's decision in *Braffet vs. Utah*, 49 L. D., 212.

> *"From a careful consideration of the evidence, the Department finds that the coal applicant has established prima facie that the land was known coal land on January 4, 1896; that the Commissioner's finding in this respect was correct; and that the Register and Receiver erred in sustaining a motion to dismiss."*

The defense was based on an erroneous construction of the first paragraph of Rule 1 of the school land indemnity selections regulations of the Adjustment Act of February 28, 1891, c. 384, 26 Stat., 796, as herein detailed.

The motion to dismiss was made by Utah and the coal company at conclusion of Braffet's case in the local land office, he taking the affirmative, as required by the appellant's rules, set out in *In re* Utah, 32 L. D., 117. The appellant in his answer made his decision part of his answer, and it is from that decision we gather the facts herein stated, and in which decision his erroneous construction of an extinct and canceled rule of "contest" is fully set forth (R., 9).

Here the appellant presents for the *first* time the proposition that since the application of Braffet had not ripened into a legal title at the time of the enacting of the coal-leasing act (Act of February 25, 1920, c. 85, Sections 1, 2, and 37, 41 Stat., 437), that the right of Braffet to complete his purchase and to proceed to

patent was cut out. The subject was not assigned as error below or set up in the answer (R., 15).

ARGUMENT.

All the alleged errors of the court of appeals and of the trial court are based on a fundamental error of the appellant, commencing when he filed his answer and stubbornly asserted ever since, and which he does not even attempt to explain away here. Every assigned and unassigned error, except question of necessary parties, and every argument attending either is based on the bald assertion that at the time of the Braffet application there existed a "rule of contest" provided for in Rule 1 of the regulations of March 6, 1903 (32 L. D., 39), reading as follows:

> "Applications presented under the mining law covering parts of a school section will be disposed in the same manner as other contest cases" (Ans., par. 6; R., p. 8).

From this isolated paragraph he built up his *every* defense, except lack of parties, and it is the only alleged rule or regulation of the department acted upon by him in the defense of his rulings of law that caused Braffet's application to be held *invalid* by him, although he determined that Braffet in the land office proceeding had established the mineral quality of the land.

On January 10, 1906 (34 L. D., 365), the above relied-on rule was abolished, the cited language *stricken out*, and in lieu thereof the following language was inserted (Rule 16):

> "Claims of parties based on mineral locations covering part of a school section, asserting that the same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patent under the mining laws are presented." (*Not as other contests.*)

That was the rule in force at the time of Braffet's application, not pleaded or relied on by the appellant, but, as a matter of fact and law, neither set of regulations could have been applied to the situation at the time of Braffet's application, since they were restricted and only applicable in the adjustment of claims by a State against the *United States* in the administration of the adjustment act of February 28, 1891 (25 Stat., 796; extended to *Utah*) arising under indemnity selection applications made by a State in lieu of lost mineral lands.

This is obvious and clear, as will be seen by a reading of the respective enacting clauses of the regulations.

The first enacting clause reads (32 L. D., 39):

> "The following rules and regulations will be observed in the adjustment of the grants to the several States and Territories made in support of common schools where the mineral or non-mineral character of the lands sought *to be* selected as *indemnity* or there made the *base* for an indemnity selection, is involved."

The enacting clause of the subsequent regulations (34 L. D., 365), reads as follows:

> "The following rules and regulations governing the selection of indemnity school lands are prescribed for the purpose of preserving a uniform method in all the States and Territories having a grant of lands for common school prior to the passage of the Act of February 28, 1891 (26 Stat., 796), *including the State of Utah*, to which the indemnity provisions of said Act were made applicable by the Act of May 3, 1902 (32 Stat., 188)."

It will be noted that the pleader in presenting in his answer the rule of contest (Ans., par. 6, R., p. 8) interpolated parenthetically (upon notice to all persons interested, *as in other contest cases*); while he had no right so to do, we wish to note that he did so.

It is an interesting and curious thing—probably the neglect or oversight of the pleader—that not since the filing of the answer has the appellant alluded to the enacting clauses, and when he set up the eliminated rule in his answer, he made no reference to the enacting clause of the regulations of March 6, 1903, but cited it as a *general* rule of practice relating to the administration of the school land grants and not one *restricted to the proof to be made by the State* when it applied for an indemnity section in lieu of one lost by the mineral exception of the school land grant, in the assertion of a claim against the United States.

We should be content on the above statement to submit our opposition here to the application for certiorari, but in an abundance of caution, in the interest of our client, we will proceed a bit further, noting briefly the many errors of the appellant.

1. He disregards entirely the decision of this Court in Sweet *vs.* United States, 245 U. S., 563. In fact, the decision is not mentioned in appellant's brief.

In fact, it is not disputed, as asserted by the court of appeals, that since the Sweet decision there was neither legal, equitable, presumptive or any other kind of title in Utah (R., p. 19), and if there was not, surely then Braffet was not precluded from making his application, nor was the operation of the statute, Sec. 2347 R. S., suspended by an eliminated rule of a regulation that has no application to the subject-matter.

Assuming or conceding that the first paragraph of rule 1 of the regulations of March 6, 1903, was in force on the date of Braffet's application (as it is identical with the first paragraph of rule 16 of the regulation of January 10, 1906), we submit these things are obvious.

The first paragraph of both regulations reads: "Where a school section has been identified by a Government survey, and no claim is, at the date when the right of the State would attach, if at all, asserted thereto under the *mining* laws or public land laws; the presumption arises that the title to the land has passed to the State; but this presumption may be overcome by submission of a satisfactory showing to the contrary."—Ans., par. 6, R., p. 8.

(*a*) We submit that the paragraph was applicable only in the adjustment of claims by Utah against the United States in the matter of indemnity selections made possible by the said Act of February 28, 1891,

which provided compensation to the State for lost mineral school sections.

(*b*) that when the State presented an application for indemnity selection and upon a base therefor, a school section, claiming it was mineral in character, but had been returned by the surveyor as nonmineral, or even if it was returned as mineral, the presumption would be that the land was of the character contemplated by the grant, and that the land had passed to the State, and the application would be rejected unless the State overcame the presumption by a showing to the contrary.

(*c*) Including the enacting clauses in the consideration of the subject, we submit no other construction is possible, and the department has ever so held since the regulation was first enacted and up to the time of the Braffet decision.

Re Oregon, 32 L. D., 105; *Re* Mahogany, 33 L. D., 37; *Re* Utah, 32 L. D., 117; and Utah *vs.* Allen, 27 L. D., 53; Bond *vs.* California, 31 L. D., 34; Dakota *vs.* Trinity, 34 L. D., 485; Dakota *vs.* Walsh, 34 L. D., 723; Dakota *vs.* Delicate, 34 L. D., 717; *Re* California, 34 L. D., 245 (construing regulation); *Re* California, 22 L. D., 294; *Re* California, *id.*, 402; Mining Regulations of March 29, 1909, 37 L. D., 728; Lindley (3d ed.), Section 336.

Conceding that the second paragraph of rule 16 of the second set of regulations was in force at the time

of Braffet's regulation, it will be noted it was not set up in the answer nor is it presented here. Its meaning is too clear to permit the appellant to urge it as a base for his present alleged rule of contest. It simply meant that if the *mining locator* on part of a school section applied for patent and the State protested the application under the indemnity selection adjustment act, the protest would be disposed of under the mining law.

The mining regulations under the mining law specifically provides what would follow the protest of Utah, or of anyone, against the granting of a mining patent (Allen *vs.* Utah, 27 L. D., 53).

If the application for patent covered part of a school section, the applicant would have to show to the satisfaction of the land officers that there had been a discovery of minerals sufficient to justify a man of ordinary prudence to proceed in his exploration, and that such exploration resulted in the development of mineral in commercial quantities, and that such discovery was made prior to the time when the right of the State attached to the land—*i. e.*, the date of the approved survey (Lindley on Mines, 3d ed., Vol. 2, Sec. 336).

Strictly speaking, the paragraph had no relation to an application to purchase under section 2347, Revised Statutes, since such an application is not made under a mining location or under the mining laws. The only rule or regulation made by the Interior Department relating to contested coal applications under section 2347, Revised Statutes, when the State pro-

tests, is the rule set up in the answer, par. 6, R., p. 8—*i. e.*, *Re* Utah, 32 L. D., 117 (which was the only decision on the subject up to the time of the Braffet decision), that applications to purchase coal lands—*i. e.*, school sections—should not be allowed in the absence of a determination by the local land officers that the land was known to be chiefly valuable for coal deposits at the time the State was admitted into the Union, and Braffet fully and in every detail followed that rule. He made his application; he could not make the necessary proof of the known prior quality of the land until he made his application and the same had been received; then, under the regulation of the department, the local land officers gave notice to Utah of Braffet's application. Utah and the coal company appeared and protested the application, claiming that the land was not known coal land on admission day; and Braffet, proceeding under the protest, made his case, which was deemed insufficient by the land officers, and they granted the motion of the protestants to dismiss the application, which was reversed by the Commissioner, and in turn the appellant affirmed the decision of the Commissioner, that the applicant had established the known mineral quality of the land prior to admission day, and that the granting of the motion to dismiss was erroneous.

So we contend that Braffet fully complied with every detail of any existing regulation relating to the subject-matter, which was the rule of action prescribed in the case of *Re* Utah, 32 L. D., 117, and set up, as we have seen, as one of the basic defenses in the answer of the appellant.

Now, we say that, treated as a contestee, or a protestant, or a contestant—call him what you may—he had legally made his application to purchase, and the application had been legally received, and he had complied with the regulations of appellant concerning proof of the known quality of the land on admission day; but appellant seeks to reduce this legal application to purchase to a mere application to contest an entry of an entryman by a person entitled as a preemptor, homesteader, or a timber-culture entryman, under the Act of May 14, 1880 (21 Stat., 140), to a preferred right of entry—*i. e.*, a settler on the public lands, who by his settlement and occupation had become possessed of a prior right of entry over one who invaded his rights which flowed from his settlement, and which adverse filing had been illegally secured through the entry of a preemptor, homesteader, or timber-culture entryman, and which settlement rights gave the contestant settler a preferred right to entry when he had by his contest overthrown the illegal filing. Then the Secretary, appellant, claims that, since Braffet was neither one nor the other of those persons, his contest was futile and he could depart upon his way *sans* money, *sans* land, *sans* everything. Such is the position of the appellant, based on his proposition that the extinct rule of regulations of March 6, 1903, *supra*, reduced Braffet and his application to the *status* of a person who, without interest in the subject-matter, had initiated, under the Act of May 14, 1880, *supra*, the contest against an entry existing on the records of the local land office, and which precluded applications to pur-

chase under Section 2347, Revised Statutes, until the mineral quality was determined, and it could not be determined by anyone, he claimed, but a preemptor, homesteader, or timber-culture applicant, all precluded and *interdicted* from securing coal lands under guise of an agricultural or timber-land entry—a unique, but not an interesting or logical theory.*

Indispensable Parties.

The Coal Company, appellant, contends (Brief, p. 32) that even if the lands here were not within the grant, nevertheless they had presumptively passed to the State (Rule 1 of the regulations of March 6, 1903), and since, under said regulations there had not been at the time of the grant a dissimilar determination, the coal company became a *bona fide* claimant *in fee*, and when it exchanged its title for a lease, it became an indispensable party defendant.

The record, pages 13-14, discloses that the appellant stipulated that the cause should be submitted to the court under bill and answer. The appellant had suggested in his answer that the coal company was absent from the record and thereon, under the rules of the trial court (Rule Eq., No. 31), brought the matter on for hearing, as a motion, as under such rule the matter of parties should be disposed of as a motion, but before said motion was effected, the appellant stipulated that

*Twice previous to the application of Braffet the department had classified the land as coal and offered the land for sale as coal land at specified price, and neither the State nor the coal company protested the classification or offer to sell.

the case should "be submitted on bill and answer"; he does not refer to the subject in his brief, but seeks to review his waived objection (R., page 15).

1. The rules of the trial court provide that no suit shall be dismisssed for non-joinder of necessary parties, but the rights of such persons shall be reserved.

Law Rule No. 28; Equity Rule No. 31.

2. The decree here expressly provides "No right of said Pleasant Valley Coal Company shall be affected by this decree" (R., p. 14, par. 2).

3. As a matter of law, no right of the United States, the State, the lessee or the lease is affected by the decree, and no right of either will be affected by the issuance of patent.

That the decree or the patent will not deprive the United States or the Coal Company of any right is obvious. When patent issues, it will only give the patentee legal capacity to sue; it will not put him into possession; he may only go to Utah and institute his action of ejectment or suit to quiet title, and if the coal company has any legal or equitable defense it may be interposed, and the patent will fall and the coal company will be secure in its possession under the lease. Scores of decisions have so held and the principle is enunciated in the case of U. S., etc., *vs.* Schurz, 102 U. S., 378, where this Court said:

> "The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain evidence of his title * * * on the

> other hand, when he obtains this possession, if there is any equitable reason why, as against the Government, he should not have * * * the United States can, by bill in chancery, have a decree annulling the patent. * * * If another party is for any reason recognizable in a court of chancery, entitled as against the relator * * * a court of equity can give similar relief. So it is plain that by non-action of the land department the legal rights may remain indefinitely undecided and those of the relator seriously embarrassed or totally defeated (as here), *while the delivery of the patent under the writ of mandamus opens to all the parties the portals of the court where their rights can be judicially determined.*"

The *Brady case* (263 U. S., 435), clearly has no application here. In that case Brady had been defeated on the merits in the Department, and sought to *enjoin* the issue of a patent to his successful opponent *without* making the successful one a party to the suit. There is nothing analogous in the situation, and Brady could secure any right to which he was entitled *after* the legal title to land passed from the United States by impressing a trust on the patent; but here the title will remain in the United States until it passes to appellee, and appellee otherwise will never be able to impress a trust on the land while the legal title remains in the United States; and further, it is impossible to impress a trust on a *discretionary* lease.

The point is further illustrated in

Doolin vs. Carr, 125 U. S., 618.

Kemp Case, 104 U. S., 636.

The United States is in nowise concluded by any matter, whether of fact or law, that may have been adjudged in a prior suit to which it was not a party. *Privett v. United States*, 256 U. S., 201; *Bowling v. United States*, 233 U. S., 528.

The situation here and in *Houston vs. Ormes*, 252 U. S., 469, is similar in principle to the case here.

There the United States had appropriated money for a specific purpose; here land had been appropriated for the specific purpose of disposition under Sec. 2347 R. S., and in the case this Court held that a suit against the Treasury officials to establish an equitable lien for attorney's fees on the fund was not one against the United States, since only a *ministerial* duty was at hand on part of the Treasury official, the enforcement of a legal right in equity.

The *appellant* cannot make a *judicial* determination of the rights of the Coal Company.

The Brady case would be analogous here if we sought to affect the lease or its administration, or if we sought injunction against the appellant in any way concerning or affecting the lease, or if the final order would in any way affect the lessor or the lessee or the lease; but it will not.

The decision will no more bind the coal lease than did the decision in the *Work-Louisiana* case, 269 U. S., 250, bind the homesteaders who were not made parties defendant in that suit. If the suit here will not adjudicate the rights of the lessee, how can it be contended the lessee was an indispensable party defendant?

Next, the appellant seeks to say the suit is in effect one against the United States, etc. (p. 7, Brief), and that, since the decree here holds its title void, it was an indispensable defendant. Without repeating what we here said *supra,* we point out that the defendant *did not* raise the issue by his answer and it *first* appeared in the court of appeals. The appellant did not move to dismiss in the trial court, and it is well settled, we submit, that where a defendant does not raise an issue by demurrer, or motion to dismiss, or by answer, he has waived every question except that of the jurisdiction of the court over the subject matter of the suit.

The subject matter of the controversy was decided in the local land office in the absence of the United States. There the United States, by mandatory statute, Sec. 2347 R. S., had directed the local land officers to sell coal land to competent persons. "Shall have the right to purchase vacant coal lands not otherwise reserved or appropriated"—and the suit under consideration here is to review the action of the appellant in obstructing that right to purchase, a right mandatory in its terms, and the United States is no more indispensable in the suit than it was in the local land office or in the appeal proceeding before the Commissioner, or before the Secretary. The latter found in the land office proceeding that Braffet had established a *prima facie* case, as pointed out in the court of appeals decision, and there was no question about his being a competent person.

The suit was no more one against the United States than any other case where the right of a qualified person to enter land under the public lands laws had been

denied by the Secretary through an erroneous interpretation of the law concerning the right to enter.

Unlike *Oregon vs. Hitchcock,* 202 U. S., 60; *Nagganab vs Hitchcock,* 202 U. S., 473; *Minnesota vs. Hitchcock,* 185 U. S., 373, and other similar cases, this is not a suit to determine title against the United States, but simply a suit to prevent the Secretary from obstructing the rights of appellee to complete his purchase, which does not affect the United States, nor is it conclusive against the leasing act or the lease or the lessee.

The United States offered its title for a price, Braffet accepted the offer, but was prevented from paying by reason of the illegal act in suspending the payment of the purchase price (Bill, par. 3, R., 2) until the determination of a "contest" to be conducted under an extinct rule relating to indemnity selections by the State, and then, as the court of appeals said, he bartered away the rights of Braffet in a thin air, to make a makeshift of a pretended lease. We did not attack the lease or the lessee in our bill, and in fact, mentioned neither, but the appellant dragged them into the litigation to bolster up his amazing errors concerning the regulations of March 6, 1903. We are only seeking to take such title from the United States that was offered to us at a price and, accepting the offer, the Secretary suspended the operation of an imperative statute, to give play to his fancy in his construction of a rule of contest that did not exist. (Payne *vs.* C. P. R. R. Co., 255 U. S., 228; Ballinger *vs.* The United States, 216 U. S., 240; Lane *vs.* Watts, 234 U. S., 525.)

Mineral school sections are subject to purchase under Sec. 2347 R. S., and appropriation under the mining law if the mineral quality is other than coal.

Notwithstanding the present claim of appellant to the contrary the department has always held that mineral school land sections were open to appropriation under the mining laws.

That the last paragraph of either regulation (Rules 1 and 16) could not relate to the validity of a subsequent mining location is shown in the case of *Utah vs. Allen,* 27 L. D., 53, where it was held that a location under the mining law could be made on a school section, and if Utah protested (as it did), the mineral applicant could proceed to patent, after establishing the *known* quality of the land, his discovery, etc.

In 1915, the then Secretary allowed the filing of a coal declaratory statement on school land, under Section 2348 R. S., in the face of a similar grant to New Mexico (after an approved survey), on a showing of the applicant that the lands were *known* coal lands (New Mexico protesting that the land was not known coal land), the applicant was allowed to enter under Section 2347 R. S. The Secretary, in holding the land subject to purchase after establishing the known coal character of the land, previous to the survey, amongst a large number of approving citations, mentioned *Re Utah,* 32 L. D., 117, the basic land office case concerning the rights of coal entrymen.

Tillian vs. Keepers, 44 L. D., 460.

In *South Dakota vs. Delicate,* 34 L. D., 717, and in *South Dakota vs. Walsh,* 34 L. D., 723, the department held that where the land was *known* to be mineral prior to the date of the approved survey, that the land was subject to mineral appropriation thereafter, notwithstanding the presumptive title of the State. The same ruling was had in *South Dakota vs. Trinity,* 34 L. D., 485; *Virginia Lode,* 7 L. D., 459; *State of Colorado,* 6 L. D., 412; *Re Miner,* 9 L. D., 408; *Warren vs. Colorado,* 14 L. D., 681; *Rice vs. California,* 24 L. D., 14.

The same rule is discussed at length by *Lindley* (3d ed., Sec. 144-145 216-217), and the Supreme Court of California, Utah, Colorado, (*Conn vs. Oberto,* 16 Pac., 369-70) and Nevada have decided likewise.

In the Olsen case (50 App. D. C., 119), it appears that Olsen made an application to purchase under Section 2347 R. S., and Utah appeared with its mesne grantee, a coal company, as here, joining in protest against the applicant, setting up the presumptive title of the State, etc. As the *Sweet* case was then pending in this Court, the then Secretary (Payne) suspended decision until the incoming of the *Sweet* decision; and thereon the secretary allowed the Olsen entry to proceed to patent to all the *surface* of the 160 acres excepting five acres on which the coal company had expended about $90,000.00 in visible improvement, and with actual occupancy of the five acres, but the secretary allowed Olsen a patent for the coal deposits in the five acres. There was no holding there that Olsen

could not proceed to patent. The case was cited by appellant in his decision (49 L. D., 212) and in the court of appeals, but is not referred to here for the probable reason that in the case and in *Burtis vs. Kansas*, 34 L. D., 304, it was held that a person holding a *bona fide* claim against the *State*, and thereby entitled to equitable consideration, could have the same satisfied through an indemnity selection by the State in its behalf. The coal company presumably intended to secure an agricultural and not a coal section. Such a presumption is the base of good faith and of equitable consideration, and the prior Secretaries of the Interior held that in these instances the State would be permitted to make the selection for the benefit of its grantee. But this coal company does not want an agricultural section; it wants a coal section, classified by the Interior Department of the value of $117,000!

In the *Ostenfeldt case* (41 L. D., 265), relied on by appellant as the base for his decision here, there was a mistaken expression on part of Assistant Secretary Adams, concerning the mistaken rule; but at that, Ostenfeldt was permitted to complete his purchase and proceed to patent. At the time his application was made to purchase, there was a stated classification price, but before Ostenfeldt made his payment the price was increased, and Assistant Secretary Adams, applying the canceled rule of contest, held that since the canceled rule controlled, the applicant was a mere contestant and the price could be increased. The decision was wholly erroneous, but is the only "authority" that the appellant produces or that he can pro-

duce, and is his only basis for the statement that there is an unbroken rule of practice for 40 years presented here.

There is not otherwise a decision in the 49 volumes of the land decisions, up to the time of the Braffet decision, holding that a school-land grant precluded the operation of the mining or coal laws, where, after an approved survey, an application for mining appropriation or coal purchase was made on proof of the known mineral character on or prior to the date attached to the grant.

Lindley, 3d ed., at Section 145 (Vol. 1), holds that—

> "School sections known to be mineral in character at the date of the approval of the survey do not pass to the State, but remain a part of the public domain, subject to exploration and purchase, the same as other public lands."

At Section 141 he says:

> "If at the time of such approval and filing they are known to be mineral, title does not pass to the State, but remains in the General Government and subject to its disposal under the mining laws (*Hermocilla vs. Hubbell*, 89 Cal., 5; *Olive Land Co. vs. Olmstead*, 103 Fed., 586; *Cosmos, etc., vs. Gray Eagle*, 104 Fed., 20; S. C. on appeal, 190 U. S., 301)."

(See footnotes, *Lindley on Mines*, 3d ed., vol. 1, p. 255, where 20 similar decisions, including decisions of this Court, are set forth.)

Lindley, in Section 144, p. 266, vol. 1, 3d ed., concerning the matter, says:

> "As sixteenth, thirty-sixth and other specially designated sections pass to the State, in the absence of legal impediment, by the survey *ex propria vigore*, or by the admission of the State after survey, there is no preliminary adjudication, actual or presumed, by the Land Department as to the character of the land. There is no antecedent judgment, as there is in preemption or homestead cases, which is final and conclusive upon collateral attack. The return of the surveyor general is in no sense such an adjudication. It follows that the question may be raised at any time by anyone in privity with the Government of the United States. The holder of a valid subsisting mining location is in such privity."

Before this application for *certiorari* was made, appellee gave notice to counsel for the appellant that the records of the U. S. land office at Salt Lake City revealed that, prior to the application of Braffet to purchase, twenty-nine coal-purchase applications and mineral appropriations of school selection had been allowed, and that none were rejected except the application of Braffet. Since the appellant does not dispute the local land office record, despite the notice of the fact, we assume we are justified in making the statement to establish the long-continued practice in such instances.

Abandonment of Contest and Withdrawal of Protest.

The decision of the learned court of appeals concerning the effect of the action of the State and mesne grantee in abandoning the contest and withdrawing the protest needs but little comment. The appellant only suggests

(*a*) that the "important fact" was overlooked that the "withdrawal was without prejudice to the interests of the intervenor," (tr., pp. 28-32)

(*b*) that same was more than two years after the passage of the Leasing Act, and therefore the application of Braffet was destroyed. No other comment is made by appellant.

Concerning the first suggestion, we point out that it has been the uniform practice of the Department of the Interior to uphold the logical, common-sense proposition that an abandonment of contest must be unconditional (10 L. D., 133; 12 *id.*, 334; 18 *id.*, 233; 5 *id.*, 40; 5 *id.*, 385; 7 *id.*, 394; 11 *id.*, 166; 12 *id.*, 495; 13 *id.*, 437; 46 *id.*, 164).

The withdrawal of contest leaves the issue between the entryman and the United States (7 L. D., 394; 5 L. D., 40; 5 L. D., 385; 9 L. D., 391; 11 L. D., 166; 12 L. D., 495; 10 L. D., 133; 12 *id.*, 334; 13 *id.*, 121-437), (a long established rule of practice, 40 years).

Withdrawal of contest by attorney conclusive (4 L. D., 267).

The waiver of claim and withdrawal from contest was a relinquishment which when filed is equivalent to

cancellation under the Act of May 14, 1880, 1 L. D., 122, when filed operates *co instanti* releasing the land from entry (3 L. D., 343, 4123) and in scores of other cases to be found on pages 625 to 633, inclusive, Digest of Decisions of the Department of the Interior, Volumes 1 to 40, all of which hold that the withdrawal or relinquishment must be unconditional and takes effect immediately and removes the obstacles in the way of the applicant; here the relinquishment removed all third parties, etc., from the contest, leaving the issue between the Government and Braffet under Sec. 2347, R. S. (and the Government was not contesting).

The case against the coal company's and the State's position here is even stronger. Claiming the State was the entryman, they *withdrew* their defenses: claiming to be the *contestees* defending against the contestant of the State's "entry," they withdrew *from* the contest. That left the record clear, since the land could not be disposed of to a *third* person until the "claim" of the State was canceled in the records of the local land office and it will always be presumed antecedent duty was performed by local land officers.

> "The local officers were correct in holding that a conditional withdrawal cannot be accepted. As the conditional withdrawal was made a part of the second application (*i. e.*, the lease) to contest, the rejection of the withdrawal carries with it the second contest." (*Mallman vs. Halff*, 46 L. D., 164.)

Vacant Land.

Appellant, brief, p. 6, contends,

(*a*) that on the date of the Braffet application, the land was not vacant coal land subject to purchase, and therefore and by reason of the said rule 1 of the regulations of March 6, 1903, Braffet was a *mere* contestant, acquiring no rights to the land.

(*b*) that prior to the conclusion of the contest, during which he was held to have made out a *prima facie* case against Utah, Congress passed the leasing act and, thereby, the right of Braffet to complete his purchase was entirely cut off. Later, and throughout his brief, appellant seeks to uphold this peculiar theory by saying, since Braffet had not a *vested* right he was not within the exception of the leasing act which saved "existent valid claim," but the similar contention was overthrown in the case of *United States vs. Stockley*, 260 U. S., 532, when this Court said:

> "The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that order is, of course, settled by the decision in *United States vs. Midwest Oil Company*, 236 U. S., 459; 59 *L. ed.*, 673; 35 *Sup. Ct. Rep.*, 309; but, as already stated, there is excepted from the operation of the order 'existing valid claims.' Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right *would require no exception to insure its preservation.* The pur-

> pose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance with the land laws, would ripen into a title * * *."

Concerning the second suggestion, that the Leasing Act cut out the application of Braffet, because it was not a vested right, appellant, contending for that proposition (Brief, p. 31), cites only *United States vs. Morrison,* 240 U. S., 192, a case which simply held that until an approved survey identified the school sections, the lands were subject to otherwise congressional disposition, since the right of the State did not attach to the lands until identified by an approved survey. We have no quarrel with such a proposition, but the base for it is not here.

United States vs. Stockley, supra.

The statement that the coal-land laws are now repealed is too broad, as such laws are still applicable to valid claims existent prior to February 25, 1920, as expressly stated in Section 37 of the General Leasing Act; and in the last paragraph of Section 5 of the coal-land regulations, approved by the Secretary of the Interior, April 1, 1920, it is stated:

> "As to coal, those claims initiated under the pre-existing law may go to patent, which, at the date of the act, were covered by valid coal declaratory statements or application to purchase which are timely, followed up and per-

fected in accordance with the controlling coal-land laws (Sections 2348 to 2352, Revised Statutes) and the regulations thereunder."

Concerning the Further Proposition of Appellant that the Application of Braffet was Invalid While the Claim of the State Remained Uncanceled on the Records of the Local Land Office, i. e., Not Vacant Coal Land.

That the invalid claim of Utah did not amount to an entry has been settled by this Court.

Chotard vs. Pope, 12 Wheat., 586.

The appellant, however, cites the case of *Durnford vs. Fall,* 52 App. D. C., 153, as holding an application to purchase coal lands under Section 2347, Revised Statutes, could not be made where the land at the time of the coal entry was not vacant coal land of the United States; but there it was in the actual occupancy of a mining locator under a placer mining location. And after citing the case, founded on a universal mining law and which no mining lawyer would even think of disputing, the appellant says (Brief, p. 25):

> "In the Durnford case physical occupancy removed the lands from the category of public lands, and here the *record* claim of the State had the same effect." (No citations.)

In the court of appeals the appellant presented the Durnford case and urged there with all the force attached to it that the claim of Utah was equivalent to physical occupancy, but the court of appeals refused to apply the case as contended for by the appellant.

At page 24 of the brief, appellant makes an erroneous statement, that vacant lands are those absolutely

free, *unclaimed* and unoccupied, and cites the *Olsen* case, 50 App. D. C., 119.

In the Olsen case a coal company, under a patent from Utah, entered into possession of the land and remained in open, visible occupation and expended $90,000 on improvements on five acres of the land; and the Secretary, while refusing patent to the surface of the five acres, gave the coal deposits to Olsen. Here the coal company was not in occupation of any part of the land and never expended a dollar on the land, and there the court of appeals sustained Secretary Payne.

In the case of *Cosmos, etc., vs. Gray Eagle, etc.,* 112 Fed., 4, affirmed in 190 U. S., 301, one Clark, a forest lieu scripper, attempted to select under the forest lieu act, as detailed in the case, land covered by four subsisting placer locations under the mining law, and the courts held the lieu selection could not be made, as the land was not vacant or unoccupied. There was nothing said in the decisions about a "claim," and every mining lawyer knows a "mining claim" is an *estate of freehold,* and up to this time the "claim" of Utah has not been so regarded. "Mining claim" is the vernacular of mining men, meaning a lode or placer location. A good example is the *Durnford* case, cited by appellant at the same point (Brief, p. 24):

> "Vacant lands are unoccupied lands." (*Shaw vs. Kellogg,* 170 U. S., 312.)
>
> *Lindley,* Secs. 166-170, 173, 216, 217, 218, 219-679.

What record claim of the State was on the records of the local land office that suspended the operation of Section 2347, Revised Statutes, until it was canceled on the records of the local land office? What reason

or authority exists that an invalid claim of the State to known mineral land to which it had neither legal, equitable, presumptive, o any other kind of a title was the legal equivalent of an entry of record in the local land office? As we have seen *supra,* no such ruling was ever made by a court or department up to the time of the Braffet decision.

We submit the theory carries its own refutation.

Appellee's Remedy.

Then appellant claims that appellee's remedy is at law and not in equity (Brief, p. 37).

He did not so contend in his answer; he did not even deny the allegation in the bill that plaintiff had no adequate remedy at law. He made no motion to dismiss the bill nor did he set the same up by answer on the now alleged error, and we submit that in failing to do so he waived the question (Eq. Rule No. 28, D. C. Sup. Ct.) This rule also covers the point that the United States was an indispensable party.

Mandamus would not lie in the suit; it could not review the errors of law or the errors of the appellant in the construction of nonexistent regulations, the presumptive title and the mass of errors leading up to the abandonment of the contest and the withdrawal of the protest, and especially so after the proceeding was closed.

The case here is analogous to the cases of *Work vs. Read, Payne vs. Central Pacific Railroad Company, Lane vs. Watts, supra,* and within the expression of

Mr. Justice Van Devanter in *Payne vs. Central Pacific Railroad Co.*, when he said:

> "Our conclusion is that, in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellant departed from a plain official duty, and that to avoid the resulting injury to the plaintiff for which no other remedy is available, an injunction should issue directing a disposal of the selection on the merits, unaffected by the withdrawal."

The rule is that, once a Federal court in equity acquires jurisdiction under proper cause, it will retain control of the parties and the subject matter, and do complete justice to all concerned, even *to the extent of enforcing purely legal rights.* The test is whether the facts existing when the action was begun were sufficient to confer jurisdiction on the court (see *Doak vs. Hamilton*, 15 F. (2d), page 778, where a number of cases, including those of this Court, are cited by the court in support of the proposition).

The suit here is akin to that of *Twist vs. Prairie Oil Company*, decided by this Court on June 6, 1927 (Advance Opinions, page 859), where the situation is similar, in that the answer is like here, namely, that petition be dismissed for want of equity, but the proceedings in the trial court and in the court of appeals were those customary in equity causes, and after the answer was filed the defendant stipulated that the cause be decided on the merits under bill and answer. The clear decision of this Court in that case does away

with the many uncertainties concerning the at times slight distinction of cases at law and causes in equity which have been productive of much trouble, litigation and expense without reaching a decision on the merits of the case or the cause.

The Application of Braffet.

While it was not assigned as error in the court of appeals or presented here as a question, or included in the specifications of error here, the appellant, in a sort of narrative way, says, at page 19, (*c*) that the functions of the local land officers had on November 10, 1915, been suspended and directions given to local land officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character, until further orders, and such instructions remained in full force until June 13, 1918, and therefore the filing of the application gave Braffet simply the status of a contestant of the claim of Utah, and he in no sense secured a vested interest in the land.

No source of the withdrawal order is given, but the fact is that while Braffet's application was made on February 4, 1918, no steps were taken by the local land officers until about July 25, 1918, when the application was allowed and Braffet was directed to pay the classified price within fifteen days; but before he could do so the appellant prevented him from so doing until the determination of the contest. We assume no point was intended by the narrative of appellant except, since Braffet made his application at a time when it is claimed the functions of the local land officers were

suspended except as to receiving the applications, that thereby, while no point is raised as to the right of Braffet to present the application and pay the legal fee, as he did, the suspension changed the application to purchase into an application to contest the claim of Utah under the extinct rule. That is what appellant says, and for that reason no special answer will be made to the narrative.

Appellant follows up the statement by claiming it is a well-settled rule in the department that no application will be received or any rights initiated for a tract embraced in any entry of record until the existing entry has been canceled on the records of the local land office (Brief, pp. 21, 22, 23). *This is probably the 40-year rule he is contending for.* No one disputes it, and it is not involved here, since the invalid claim of Utah was not an *entry* of the public lands in the local land office. No court ever announced such a rule of law concerning a "claim" of a State; no Secretary until now ever said there was such; no regulation or rule of the department ever so announced; but the Secretary here applied the extinct indemnity selection regulation (rule of contest) of March 6, 1903, to the situation.

In *Mallman vs. Halff*, 46 L. D., p. 164, this appellant, construing Rule of Practice 2, the rule invoked by him here as the rule of contest so referred to that must determine the Braffet application, said:

> "Rule of Practice 2 requires an application to contest to contain a statement of the law under which applicant intends to acquire title,

> and facts showing he is qualified to do so. The reason for this rule is obvious. It was intended to prevent contests by persons who were not qualified to exercise the *preference* right awarded to successful contestants."

The so-called entry of the State never was made, and it will never be canceled, since it never existed. The appellant does not claim it was the equivalent of an entry, but that it was an entry, and therefore could only be contested as provided for in the act of May 14, 1880 (21 Stat., 140) (and said Rule 2 of General Practice), which provided for contests by "settlers"—*i. e.*, that Braffet was a "settler" and made an application to contest as a "settler" the entry of Utah, the entryman! All these paradoxes flow from the false premise, the extinct rule.

Just why appellant cited *Work vs. Rives*, 267 U. S., 175 (and the cited cases in the opinion of our learned Chief Justice), is not apparent, as that case is one of the outstanding decisions that mandamus will not lie as a writ of error, and that decisions of executives to whom judgment and discretion in the administration of a statute is committed will not be reviewed by mandamus, which will never operate as a writ of error; all of which is a good reason why mandamus was not sought here.

The proposition here of appellant is that no construction made by him of any law of the United States committed to his administration is reviewable by the courts at law or in equity, however erroneous, unless it is arbitrary or capricious and he would have this

Court apply the *limited* rule of the *Decatur* and *Rives* cases to every instance of the construction of an administrative statute which would relieve the Secretary of all restraint and make him the chief legal force of the United States. Here he contends the remedy is only by mandamus and if the proposition was granted he would then probably contend that since *Decatur and Rives* held review could not be had by mandamus the appellee would be without remedy, probably overlooking, as he does here, that the *Rives* case related to the distribution of a Congressional *gratuity* and the statute granting it expressly providing the distribution should be final and conclusive and that no court should have the right to review the distribution of the gratuity of the United States amongst those unfortunate persons that complied with the request of the United States in time of peril and war.

In connection with the subject, appellant claims (Brief, p. 30) that, "so long as the title to the tract was *sub judice* in the Department on Braffet's 'contest,' Braffet could neither seek his purchase under Section 2347, R. S., nor secure vested rights to the land, and that his claim was clearly not within the exception of the leasing act." A fundamental rule relating to the doctrine of *sub judice* is that of relation—*i. e.*, that when the claim is established by relation it becomes effective as of the date of the initiation. The rule of relation is well established in the numerous decisions of this and other courts in the Mexican land-grant cases, where it was uniformly held that when a Mexican grant claimant established his grant before the

United States Land Commission, and that special tribunal confirmed the grant, then, by relation, the confirmation was of the date of the grant and cut out all subsequent claims arising under other attempted disposition of the lands under the law of the United States.

The case of Kerwin *vs.* Murphy, 189 U. S., 35 (Brief, p. 32), is not applicable here for the following reasons, namely, that the suit was one to enjoin the Land Department from proceeding with a survey which it was claimed would, if carried out as threatened, prejudice the rights of the plaintiff and all other claimants of like character with him, and the courts simply held that the bill did not show that it was necessary for the prevention of irreparable injury and of a multiplicity of suits as to constitute grounds for equitable relief by injunction against a threatened survey, under the direction of the Land Department, of lands to which claimants asserted title, but which the department claimed were unsurveyed public lands of the United States, and where such survey could be made without material injury to the soil or timber, and where persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent rights, and therefore the court held it could not interfere with the executive administration of the Land Department, as it was purely an administrative function concerning the *physical* fact.

Neither is there anything adverse to appellee in the citation (Brief, p. 20) of *Shepley vs. Cowan,* 91 U. S., 330. The grant there was not one of place, but one of

quantity, dependent on a survey to be made by the Secretary of the Interior, and the court merely held there that, until a survey was made by the Secretary, the State could not assert title under its own action and pass it away by patent, as the grant had not attached until its boundaries were determined, just as a school grant would not attach until the sections had been identified by an approved survey.

Neither are the cases of *Stewart vs. Petersen*, 28 L. D., 515, or *Holt vs. Murphy*, 207 U. S., 407, applicable here, since the principle announced in those cases is not disputed here, namely, that an entry will not be allowed in the presence of a previous uncanceled entry existing on the records of the local land office. What we contend here is that a claim of Utah that she had taken present title under the school land grant to mineral school sections is not an entry that precluded the application of Braffet.

The claim was broadly asserted before the Sweet decision, supported by a decision of a circuit court of appeals, that all mineral sections had passed to Utah, but after the Sweet decision the pretension was *functus officio*.

Likewise with the citation of *Cameron vs. United States*, 252 U. S., 450, cited in Brief, page 17, namely, that so long as the legal title remained in the United States and proceedings for acquiring it by an applicant under the land laws were pending, the courts would not interfere to control the exercise of power to determine the rights of the applicant, etc.; all of which no one will dispute; but the situation is not here, since

the appellant admits the proceeding in the department has been closed and that appellee has exhausted the procedure of the Land Department (Answer, par. 16, R., 12; Bill, par. 16, R., 5).

We are not seeking, and could not seek, to control a proceeding pending and under determination in a department where findings of fact by the Secretary are conclusive, nor would we seek to anticipate a ruling of law; but that the erroneous rulings of law affecting a right of a qualified person under the land laws of the United States may be reviewed by the courts is so well settled that citation of authority might well be deemed trite.

As said in *Plested vs. Abby*, 228 U. S., 42 (and for some strange reason cited by appellant (Brief, p. 16), "While title to the public lands remains in the United States and proceedings for acquiring that title are still *in fieri*, the courts are without power, by injunction or otherwise, to control the judgment and discretion of the officers of the Land Department."

True, but the Braffet application is not pending, *in fieri* or otherwise, in the department. The department is through, has exhausted its jurisdiction and closed the proceeding, and the only jurisdiction present is that of the courts. The juridical temperament of the appellant is well (or otherwise) expressed in a recent decision, *Re Day*, 50 L. D., p. 24, where it is said: "The rules of law as administered by courts are binding upon the Land Department *only* in so far as they are not adverse to, but assist, its function as an administrative branch of the Executive Department of the

Government, which, as the proprietor of the public domain, is a party to all proceedings looking to the disposal of any part of that domain, and in its executive administration is entitled to rely upon and adhere to the classification of its lands, once arrived at, even though between others than the parties to a new application to entry." This principle, of paramount nature, of the administrative side of the Land Department work, rather than its function of adjudicating the rights of private claimants, entitles it, in so adjudicating, to respect and follow its own former adjudications as to particular lands, even though not binding in strictness upon a new claimant."

The appellant made no motion for a new trial or for a rehearing in the trial court, and that court had no opportunity to listen to the points he later sought to raise in the court of appeals, and in the latter court he did not move for a rehearing, but came here with new questions, presented here for the first time, chief of which is his new proposition that the Leasing Act of February 25, 1920, authorized the barter, since the Leasing Act cut out the right of Braffet to complete his purchase. We submit, that question cannot be presented here.

Finally, we urge that *certiorari* should be denied here, and for the following reasons:

(*a*) That the question, namely, the construction by the court of appeals of a construction by the appellant of a rule of contest is not reviewable under Rule 35 of this Court.

(*b*) That the Secretary had no jurisdiction to adjudicate the validity of the conveyances running to the mesne grantee, the coal company; and, since it was a claim of title having its origin in a law of the United States, the Utah school-land grant, the question was one for the State courts to determine.

Shulthis vs. McDougall, 225 U. S., 561.

(*c*) that the question is moot, in view of the recent congressional action confirming mineral school sections to the State (Public No. 570, 69th Congress), which will render unnecessary the application of an extinct rule, either to a State indemnity selection, or a mining location on a mineral school section, or the attempted purchase of a coal school section.

Seven years have passed since the Leasing Act, which cut out the Coal Act, except as to existing valid claims, and all in all the questions are dead, passed into the great silence, and no revolution in land-office practice will occur by reason of the decree here, as is apprehended by the appellant.

We respectfully urge that *certiorari* be denied.

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Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 344.

HUBERT WORK, AS SECRETARY OF THE INTERIOR,
APPELLANT,

vs.

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ARGUMENT FOR APPELLEE BY MR. WALTER EDMUND BURKE.

WALTER EDMUND BURKE,
Attorney for Appellee.

INDEX.

MEMORANDUM.—Since the brief of appellee opposing the application for certiorari is fully indexed, containing all citations and propositions discussed here, we felt it would be unnecessary to reindex here.

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Preface.

While there is really no question before this Court but the construction by the court of appeals of a construction by appellant of an alleged rule of his Department, one that had been *annulled* 10 years before

this suit arose, the astonishing series of errors built up by the appellant on the annulled and cancelled regulation requires appellee's counsel, in support of his client, to file this argument in addition to the printed brief filed by him in opposition to *certiorari*.

With due respect to the learned Secretary of the Interior, counsel respectfully submits that a greater comedy of errors was never submitted to this Court than is presented by the record here.

In a preliminary way, we suggest that there is no question here that can, under the rules of this Court, be reviewed.

There is no Federal question here arising under the laws of the United States, nor is there a question concerning the application of any decision of this Court. All the questions here, except one or two of minor importance, relating to practice, revolve around the construction of a canceled rule, one that was annulled many years before the appellant sought to present it as the basis of his defense, coupled with the fact that the canceled regulation, when in existence, had no application to the subject-matter.

For the support of the preliminary objection to consideration, we present the cases of *Shulthis vs. McDougall*, 225 U. S., 561-9; *Hull vs. Burr*, 234 U. S., 712-20; *Norton vs. Whiteside*, 239 U. S., 186-8. (See appellee's brief opposing application for certiorari.)

ARGUMENT.

May it please the Court:

In lieu of an oral argument, appellee's counsel begs leave to submit it in this form, thereby making for accuracy and saving the time of this Court.

The case came here on the application of the appellant for *certiorari* to review the decision of the Court of Appeals for the District of Columbia affirming the decision of the trial court in substantive matters. All the essential facts are set forth in the decision of the court below (R., p. 17).

It will be noticed that the learned court of appeals did not hesitate to speak sharply of the inconsistent action of the appellant in disregarding the rights of the appellee, and we submit the language was amply justified. Seldom does the learned court below fail to speak in cold and measured language concerning a litigant, and it requires an unusual record to induce that court to depart from its custom, but we submit the justifying record is here.

No exception was taken or defense attempted by the appellant, in his application for *certiorari,* to the criticism of appellant made by the court below, and we will make no further comment concerning the subject.

The appellant attempts here to set up (to run around the end, so to speak) alleged errors not presented by him in either the trial or appellate court and which appear here for the first time, and they are severally noted following. That such course may not be followed is too well settled to admit of discussion.

The first of such alleged errors is that since Braffet had not paid the full purchase price ($117,000), he had no legal status that would prevail against the leasing act of February 25, 1920, since that act repealed Section 2347, R. S., which permitted qualified persons to purchase coal lands of the United States. The contention made here by the appellant is that since on the date of the leasing act Braffet had not paid the full purchase price of the quarter section, he had not a *vested right* to the land that was excepted from the operation of the leasing act, and that therefore such rights that had attached were wiped out by the repeal of the coal land laws.

The record clearly shows the issue was not presented by the answer, was not assigned as error in the court of appeals, and its first appearance is here, being assigned as error in the application for *certiorari* (R., p. 16).

We submit that, even if the issue had been presented by answer to the trial court and assigned as error in the court of appeals, the point would be without legal force.

The record clearly shows that Braffet duly made his application to purchase the coal land under Section 2347, R. S.; that he paid the filing fee required by law; that his application *was accepted* and given a serial number, as required by the regulations of the appellant controlling the local land office, and that thereon the local land officers, pursuant to the regulations of appellant, gave Braffet 15 days' notice in writing to pay the purchase price, but before the expiration of

that time the appellant made it impossible for Braffet to comply by suspending the acceptance of the purchase price until the contest instituted by Utah had been determined. That is the admitted situation, but now appellant contends there could be no valid existent right resulting, since Braffet had not paid the final purchase price before the date of the leasing act.

Speaking of the subject, the court below said:

> "If the lands in question were vacant coal lands of the United States when the application was filed, then Braffet's right to complete his purchase cannot be assailed. That the lands were vacant coal lands has been determined by decision of the Secretary in the original appeal, 49 L. D. 212, as follows: 'From a careful consideration of the evidence, the Department finds that the coal applicant (Braffet) has established *prima facie* that the land was known coal land on January 24, 1896; that the Commissioner's finding in this report was correct, and that the register and receiver erred *in sustaining the motion to dismiss.*' "

The position of the court below is sustained by the admissions of the appellant made in his answer, namely:

I. That on February 4, 1918, Braffet filed his application to purchase and paid the legal fee, and that on July 25, 1918, the application was approved (R., pp. 1-2, par. 3).

II. That on the date of admission of Utah the lands were a part of the public domain and *known* coal lands of the United States. No denial of these allegations

was made by the appellant, and these two admissions are fully in accord with his decision that in the contest proceeding Braffet had *prima facie* established such allegations.

III. Continuing, the bill of complaint alleges that the quarter section was not otherwise appropriated or reserved, and, answering same, appellant, by way of avoidance only, set up that at the time of Braffet's application *he* knew that the land was not vacant coal land not otherwise appropriated or reserved by competent authority. Surely, it cannot be said that such allegation was a denial of the allegation of facts. At best, it is only *arguendo,* a mere legal conclusion. Then follows, *arguendo,* that until the land had been found and determined (by some competent authority) to be mineral in character, title had presumably passed to Utah on its admission to the Union, and that the filing of Braffet's application was *in effect* but an application to contest the presumed title of Utah (Answer, folio 12, R., p. 7).

No other denial was made concerning the allegations of the bill of complaint concerning the application or the known quality of the land on the date of the admission of Utah into the Union.

In his answer (folio 9, R., p. 9) appellant set up, *arguendo,* that, since and after the application to purchase, the mineral leasing act of February 25, 1920 (41 Stat., 437), "had become a law, which said act repealed all previous laws authorizing sale of coal lands, except as to claims within the saving clause of Section

37 of said act, and that plaintiff's application was not a valid claim within the meaning of said act."

Appellant did not set up the same as an allegation of law or fact but alleged that he had so held in his Department decision (49 L. D. 212), but did not reiterate it in his answer nor did he allege that such was the fact, and the subject matter was not assigned as error in the court of appeals (R., p. 15).

The extraordinary legal contention of appellant is based, as he claims, on the proposition that no claim or application was a valid existent claim within the saving clause of Section 37 of the leasing act unless it had ripened into a legal title, and he based the contention on *Morrison vs. United States,* 240 U. S., 192, where this Court upheld the right of Congress to dispose of land included in a school land grant to a State up to the time of an approved survey. The citation is too clear to require any discussion and is wholly inapplicable here in view of the saving clause of the leasing act, except to wholly refute the contention of the appellant that Congress could repeal the coal land law to the extent that the repeal could upset rights lawfully initiated under it.

As near as can be ascertained, the further contention is that the application of Braffet was not the valid claim contemplated by Section 37 of the leasing act because of the fact that it had not reached a point where Braffet could by mandamus compel the Secretary to issue him a patent for the land, *i. e.*, all obstructions to the application removed and the purchase price paid and final receipt issued.

We submit that this Court has definitely held otherwise in defining the meaning of a "valid existent claim" in *United States vs. Stockley,* 260 U. S., 532, where Mr. Justice Sutherland said:

> "Obviously this means something *less than a vested right,* such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which upon compliance with the land laws, would ripen into a title." (Italics ours.) Appellant makes no reference to that case, but simply ignored it.

The decisive statement of the court below that the application of Braffet to purchase the quarter section is fully alleged in par. 6 of the bill of complaint (R., p. 2, par. 3) where it is alleged

> "That on or about the 25th day of July, 1918, the said register and receiver approved said application and subsequently directed said plaintiff to complete his purchase by payment within fifteen days thereafter at the price designated in the classification price thereof; but before the expiration of said period, by order of the Department of the Interior therein, said payment was suspended and deferred until the determination of the contest * * *."

Answering the paragraph, the defendant-appellant alleged (Ans., p. 6, R., p. 7, par. 6) (only).

> "That on June 13, 1918, the order of November 10, 1915, * * * was suspended and there

> upon, and on July 25, 1918, the local land officers *allowed the application of plaintiff as an application* and directed the issue of notice, etc.''; (italics ours).

and then proceeds, *arguendo,* that if the allegations of plaintiff's paragraph 6 were true, then the local officers acted without authority and contrary to the (cancelled) regulations of the Department (*i. e.,* the regulations of March 6, 1903), and that such acts were void and of no effect, and then defendant, *arguendo,* contended that what was really intended by the local land officers was to allow plaintiff's application as an initiation of a contest proceeding against the State, *i. e.,* as directed by the nonapplicable and cancelled regulation.

Surely in face of the foregoing, appellant will not be permitted here to say that Braffet lost his rights because the appellant would not permit the local land officers to accept the purchase price. It would have been an idle thing, a futile act for Braffet to tender the purchase price to the local land officers in the face of the order of the appellant suspending the payment until the determination of the contest instituted by Utah.

He tendered no such issue by his answer and made no assignment of error concerning the same in the court of appeals.

Then, too, his own rules concerning the attempted construction of Section 37 of the leasing act is against him. After the passage of the leasing act and on

April 1, 1920 (47 L. D., 490), we find him announcing as follows:

> "As to coal, these claims enacted under the preceding law may go to patent, which, at the date of the act, were covered by valid declaratory statements *or applications to purchase,* which are truly followed up and perfected in accordance with the controlling coal land laws." (Italics ours.)

Following this regulation, the appellant held, *re Forrester,* 49 L. D., 190, that "a valid claim existent" and "a substantial right" were equivalent and "either phrase denotes such a claim or right, existent *prior* to the leasing act, as, if regularly followed up, *would ripen into acquisition of ownership under the provisions of the former law.*"

To support his contention that the application of Braffet was not valid and that, *arguendo* the application to purchase was under the regulations of the Department, to be treated as a mere application to contest the presumptive title of the State inuring under an approved survey of the school land grant, it became necessary for the appellant to contend that the mythical claim of the State was the legal equivalent of a cash entry by a citizen, and that while the claim of the State remained uncanceled on the records of the local land office, the land was not subject to cash sale under Section 2347, R. S.; *i. e.,* that the claim of the State to *known* coal lands suspended the operation of the coal land laws.

To have a basis for this unique and extraordinary contention, it became necessary for appellant to create some legal barrier, and accordingly he set up in his answer (R., p. 8) the following matter: "but he avers that on March 6, 1903, a circular of instructions, approved by the Secretary of the Interior, issued out of the General Land Office, which circular *was* in full force and effect at the date of filing of plaintiff's application, as well as at the date of issue of notice thereon, as aforesaid, which circular in terms provided:

> "When a school section is identified, by the government survey, and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or public land laws, the presumption arises that the title to the land has passed to the State, *but* this presumption may be overcome by the submission of a satisfactory showing to the contrary. *Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as contest cases.*" (Italics ours.)

Under the last paragraph (in italics), the appellant contended, in the courts below and here in his brief in support of his application for certiorari, that

(*a*) Braffet's application was to be treated as a mere application to contest the "entry" of the State.

(*b*) That even if successful, Braffet could secure no right thereby, and that the only result of his successful

contest would be to cancel on the records of the local land office the *entry* of the State, and leaving the land open to the applicant, qualified first in time under the laws of the United States.

It will be noted that the paragraph in italics is the base of the defense that the application of Braffet was invalid.

A reader of the pleading, judge or lawyer, would naturally infer that the appellant was setting up an *existing* rule of practice relating to applications to make cash purchases of coal land under Section 2347, R. S., and at a casual glance it might appear the appellant had some basis for his contention, but when we examine the subject we quickly find that (*a*) the regulation related entirely to an entirely different subject, and (*b*) that it was canceled *years* before Braffet made his application to purchase.

The alleged regulation is to be found at 32 L. D., 39, and we find that the pleader omitted from the answer the special purpose of the rule, or the special purpose to which it was applicable. Turning to the book and page we find the following:

> "DEPARTMENT OF THE INTERIOR,
> GENERAL LAND OFFICE, *March* 6, 1903.
>
> Registers and Receivers of United States Land Office:
>
> SIRS: The following rules and regulations will be observed in the *adjustment* of the grants to the several States and territories made in aid

> of the support of common schools, where the mineral or nonmineral character of the lands sought to be *selected as indemnity,* or those made the base for an *indemnity* selection, is involved."

It only requires a glance to show that the vaunted rule that suspended the operation of Section 2347, R. S., related solely to an instance where the State tendered for the base of its indemnity selection a *mineralized* school section excepted from the operation of the grant, and the *presumption* was that the land was nonmineral, when it had been included in an approved survey, *but that the State* would be permitted to overcome the presumption and that in so doing the tendered school section would be the base for the indemnity selection.

But the pleader twisted the rule into an expression that the rule wholly applied to every instance where the citizen under any law of the United States controverted the claim of the State, and that in any such instance the presumption would be that the title had passed to the State, and that even if the citizen established the fallacy of the State claim, nevertheless no rights could be initiated or could accrue in any instance to the citizen, since his application to purchase could only operate a mere contest of the State claim without resulting rights.

But even if this plain purpose of the rule is controverted by judicial construction and thereby made applicable to the defense suggested here, it will be still

found inapplicable by reason of the fact *that* on January 10, 1906 (34 L. D., 365), *it was superseded and canceled* by school lands—Indemnity Regulation, Rule 16—which cut out the portion of former Rule 1 set forth above in italics and substituted therefor the following:

> "Claims of parties based upon mineral locations covering part of a school section, asserting that the same were known to be chiefly valuable for the mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the mining law are presented (citing Mahogany No. 2, Lode Claim 33, L. E., 37; State of Utah, 32 C. D., 117)."

So we find the paragraph did not relate to the validity of the Braffet application nor was it existent at the time of his application.

Two rules or regulations divergent in purpose and character cannot exist at the same time, and, like a statute, the last expression on the subject must control.

It is evident that the purpose of regulation 1, of the first regulation, and of Rule 16, of the second set, related to the same subject in the main, namely, that where the State applied for an indemnity selection in the face of a mining application, asserting that the land was known mineral land at the time the grant attached to the State, *i. e.*, the date of the approved survey, then the validity of the mining entry *would not be determined in the State indemnity selection proceeding,* but would be determined when the mining

locator attempted to proceed to patent and would be determined only in such a proceeding; it is further evident that the first paragraph of each regulation, which are identical in tenor, was to *enable the State* to overcome the presumption attending a school section included in an approved survey and returned as nonmineral by showing that on the date the grant attached to the State the school section (or a part of it) was *known* mineral land and thereby excepted from the operation of the grant; and for that reason could only be used as a base for an indemnity selection of a nonmineral section. The errors of the appellant evidently grew out of three facts, namely, (*a*) he did not know at the time of his answer that the first regulation was limited as above described; (*b*) that he was not aware of the preamble or enacting clause of the regulation which limited its applicability, and (*c*) he did not know that it had been cancelled and annulled years before the application of Braffet. No rule of practice in the Department of the Interior can arise through mere oral declaration or expression of the Secretary except when he construes an existing duly promulgated regulation.

A Secretary may not point to a canceled rule and say "that is the rule of this proceeding regardless of the fact that it was cancelled years ago." but that is what he did in the Braffet contest proceeding which is under review here.

The further allegation in the answer setting up the case of *Re Utah*, 32 L. D., 117, will now be briefly con-

sidered. There Utah presented an application to the Land Office, asking that the mineral quality of designated land be determined, since the State claimed the land was included in its school land grant, and further alleging that divers applications to purchase lands, included in said grant, had been allowed by the local land officers.

The application to so determine was denied by the Land Office and the regulations of March 6, 1903, *supra*, were cited to uphold the proposition that mining applications would be determined at the time of application for a mining patent; but not on the application of the State.

Concerning the then existing granted applications to purchase, it was said the same "should not have been allowed in the absence of a determination that the lands were known to be chiefly valuable for coal deposits at the date the State was admitted into the Union."

The decision then proceeded to direct the local land office to give notice to all such persons that their accepted applications to purchase would be canceled unless within a *reasonable* time, and *after* notice to the State, *they satisfactorily* established that the lands were known to be chiefly valuable for coal at the date of State admission.

In fact, that is the only regulation ever made by the Department of the Interior concerning contests over school lands between a coal applicant and the State, and it is impossible to twist out of it, by any construction, a procedure that turned an application to pur-

chase into a mere contest of the right of the State that, even though successful, gave no rights to the coal applicant, except to go upon his way with only the satisfaction of upsetting the claim of the State and establishing the title of the United States. And we are willing to stand on that Land Office decision. The case did not apply the regulation of March 6, 1903, except as it affected the position of the State. There the State alleged that the lands had been returned as mineral, but the Secretary held that a mere mineral return by the surveyor general did not have the effect to take lands out of the grant, and in indicating how the State could establish the fact and make an indemnity selection referred to the then existing regulation.

It is apparent that Braffet fully complied with the practice announced by that case. He made his application, paid his fee, notice was given to the State, the State appeared, Braffet made a *prima facie* case and thereon the State abandoned the contest in the manner disclosed by the record and by the decision of the learned court of appeals.

Every contention of appellant here relating to the validity of Braffet's application and the results flowing from them are solely based on the infallibility of the construction by appellant only, of the annulled and cancelled regulation of March 6, 1903. There is no long-established rule of practice, of forty years or otherwise, involved here, but simply a mistake of the appellant in applying a canceled regulation which in fact was only applicable when it existed to an instance where the State applied for an indemnity selection,

using as a base a school section in part (or in whole), covered by an application under the mining laws, and, even if the coal-land law be defined as a mining law, the situation remains unchanged. There is no other rule that can be construed to uphold his theory or to defend his action.

III.

As we have seen, the Leasing Act expressly excepted "*valid existent claims*" from its operation and permitted them to proceed to patent under the public land acts on which they were founded. In other words, the Leasing Act did not *repeal* the particular act on which they were based in so far as the existent claim was concerned, and it will be noted the Leasing Act referred to valid existent claims and not to vested rights, the latter being an instance where the final certificate of purchase had issued, or where the land had been certified for patent, etc.

However, the appellant, without assigning the subject for error in the court of appeals, has vaguely sought to maintain here that, since Braffet had not secured a *vested right* under his application to purchase, the Congress could subsequently abrogate the coal-land law and that the application would lapse.

That the Congress could destroy the rights otherwise flowing from an unperfected right by repealing the law from which the right flowed, is not disputed, as the rule has been announced in numerous cases, such as *Morrison vs. United States, supra; Frisbee vs. Whitney, 9 Wall., 187; The Yosemite Valley case, 15 Wall., 77; and other cases;* which cases simply held

that settlement on public lands with a view to preemption, etc., conferred no rights on the settler until entry made and payments made after land had been offered for sale. And the essential inquiry here is whether Braffet secured a right falling within the exception of the Leasing Act, and not whether he had a vested right. The case here is like *Lytle vs. Arkansas,* 9 How., 333, cited in the Yosemite Valley Case, to the effect that a right lawfully initiated could not be defeated by failure of executive officers to perform their duty after the applicant acquired a right that would lead to the title of the government. Here, after the acceptance of the application by the local officers, the appellant suspended and deferred the payment of the purchase price and that situation continued until the Leasing Act came.

As said in the Stockley case, *supra,* a vested right would need no exception to preserve it, as the Congress could not legislate away a vested right, and therefore the exception in the Leasing Act did not refer to a vested right, but to a lesser right that would ripen into a vested right on due performance by the applicant; and such lesser right was the right protected by the Congress in the exception of valid existent claims. The vested right of Braffet would have accrued on the payment of the purchase price which appellant refused to permit Braffet *to make.*

The Secretary-appellant incidentally alleges that on the date of Braffet's application, namely, February 4, 1918, the functions of the local land office had been suspended by him, and the local land officers had been di-

rected to send all applications to the general land office (R., p. 6) and then proceeds, *arguendo,* to state that thereby and by reason of the (cancelled) regulation of March 6, 1903, said application to purchase was treated as an application to contest the claim of the State, and then proceeds, *arguendo,* that if the local officers *approved* the application to purchase, they acted contrary to law, etc., but he admits in the same paragraph that the land was restored to entry on June 13, 1918, and the allegation in the bill of complaint is that the application to purchase was approved thereafter on June 25, 1918, and that allegation was not denied by the appellant, but, while no assignment of error is made by the appellant concerning the same, he does allege, *arguendo,* that if the local land officers did approve the application, they acted contrary to the (cancelled) regulation of March 6, 1903 (R., p. 8).

Disobedience by the local land office of a regulation concerning the administration of a statute does not affect the rights of an applicant. In the Stockley case, *supra,* the local land officers issued a final receipt to Stockley in direct violation of an existing regulation of the land department that local officers should not receive the purchase price or issue final certificates, but must suspend the entries, etc.; but this Court said it did not matter.

Here the application to purchase was accepted, and given a serial number, and all fees required by law were paid by applicant and accepted by the local land officers, who thereon gave to the applicant the 15 days' notice to pay the purchase price; and thereon the ap-

pellant intervened and obstructed the payment of the purchase price by suspending the acceptance of the same until the determination of the contest filed by Utah.

If the right of Braffet is to be considered as an *inchoate* right, still it was preserved by the express language of the Leasing Act, and takes it out of the Frisbee-Whitney rule relating to vested rights.

Here the Secretary-appellant, confronted by the saving clause of the Leasing Act, held that the application to purchase conferred no rights on Braffet, as under the operation of an annulled and canceled regulation it was but a mere application to contest the presumptive title of Utah arising under a school land grant that excepted known coal lands from its operation! If it were not for his mistaken application of a non-existent rule, it is fair and logical to presume he would have held otherwise, and then it would at once become apparent that Braffet had a "valid existent claim" that would have ripened into a patent on payment of the purchase price, which the appellant prevented him from making.

So, we have no quarrel with the Frisbee-Whitney case, or with any similar expression of this Court, because the question is not here. Neither is the question of a vested right here, and if there is any question here (there being no assignment of error in the court of appeals) it is simply whether the application of Braffet was a valid existent claim that could have legally ripened into full legal title if there had been no illegal obstruction created by the Secretary-appellant; and

concerning that matter, we urge that the Braffet application is within the definition laid down in the Stockley case by this Court, but the appellant held it was not even a right or a claim of right, since the *cancelled* regulation suspended the operation of the coal-land law and precluded even the making of a valid application to purchase. And then he contends that his illegal act in preventing Braffet from completing his purchase must operate against the innocent one and not against the wrongdoer.

IV.

The applicant set up in his answer (R., p. 12), and urged in the court of appeals, that the Pleasant Valley Coal Company was an indispensable party to the suit, the argument being, apparently, that since the corporation was a subsequent lessee of the controverted lands, under the Leasing Act, an adverse decision here, in its absence, would destroy the lease and the rights of the lessee under it. The record fully discloses (R., p. 14) that after the suggestion was made, the appellee brought on a hearing of the question under the rules of the trial court, as a motion; and thereon the Secretary-appellant *consented that the case be submitted for decision on the merits under bill and answer* (R., p. 14).

While it must be apparent that thereby the Secretary-appellant is not in position to renew the objection here, and upset a trial and determination had on his consent and stipulation, we urge that the objection in the first instance was without legal force, since, in any event, no right of the alleged lessee will be affected,

impaired or destroyed by the affirmance of the decree of the trial court. The legal result of affirmance will not oust the corporation from the land; a patent on payment of $117,000 will issue to appellee, and thereon he must take his patent to the courts of Utah and institute his action of ejectment, and any defendant in that suit may set up his alleged lease, and if valid, the lease will defeat the patent. The proposition has been upheld time and time again, as will be seen by reference to appellee's brief in opposition to the application for certiorari.

The main reliance of appellant for his contention is the Brady case, 263 U. S., 435, but its utter inapplicability will be seen by a glance at the case.

There Brady sought to enjoin the Secretary from issuing a patent to Harper, who had defeated Brady in a department contest for the land, the Secretary holding that Brady was without right in law or in fact; and thereon Brady sought injunction against the Secretary, but did not make Harper a party defendant. We do not seek to enjoin the Secretary from executing the lease, nor did we seek to maintain any claim against the lessee. In fact, we did not mention either in our bill of complaint, but the matter was injected by the Secretary-appellant. Until patent issues we cannot assert any right against the alleged lease or lessee, either at law or in equity; neither can we enjoin the Secretary or the alleged lessee from asserting the lease; neither have we a remedy at law or in equity. We cannot impress a trust on the Federal lease, as we might possibly

do on a patent. We cannot in equity impress a trust on the judgment or discretion of the Secretary in the matter of selecting a coal tenant under the Leasing Act. Our position as a patentee simply gives us our day in court, where we must establish the invalidity of the alleged lease if it is presented as the basis of the defense in an action of ejectment or in a suit to quiet title; while in the Brady case the granting of an injunction, etc., would have destroyed the rights of Harper without giving him an opportunity to assert and defend his rights; and he would be utterly without remedy.

Here the coal company is probably in possession under an alleged lease from the United States, though the fact is not disclosed by the record, and if it is valid, the patent falls. We have discussed the point and cases fully in our brief opposing certiorari.

V.

While the Secretary-appellant here claims the United States is an indispensable party to the suit, he did not present the objection by answer, but raised it for the first time in the court of appeals.

We submit the same reasons apply to the suggestions that we set forth in answer to the proposition that the alleged lessee was a necessary party.

No right of the United States will be affected by the patent. They may resist the patent by appearing in the ejectment suit, or they may bring direct suit to cancel the patent, or they may bring suit to quiet their title.

It is a fundamental proposition of law, often announced by this court, that the United States are never bound by any judgment, order or decree in any suit to which they were not parties.

VI.

It was set up in the answer, but not assigned as error in the court of appeals, that the suit was one against the United States and therefore could not be maintained.

The basis of such an objection necessarily is that the result of the suit will be (*a*) to bind finally the action of the United States, or (*b*) to take something away from them. As we have seen, the issuance of the patent can not in any way bind either the United States or the alleged lessee, and nothing will, in any event, be taken from them except for value, the classified coal value of $117,000, established by the Government.

The United States offered to sell the land to any qualified citizen for the classified price, *and Braffet accepted the offer* and made his application to purchase in the manner directed by law.

The Secretary-appellant *obstructed* the application, after its acceptance by the local land officers, and the suit, practically, is to remove the illegal barricade erected by the Secretary-appellant, and that being done, to proceed to patent. The United States have nothing to do with the matter, except to refuse patent until the payment of $117,000 is made by the appellee.

They are merely lookers on. The application having been duly made and accepted, they cannot withdraw the offer. Their servants, the land officers, are only affected by the final decree and this suit is against a servant of the United States and not against the master.

VII.

Finally, the Secretary-appellant contends that the remedy of appellee was at law, and not in equity; by mandamus, and not by mandatory injunction.

He did not move to dismiss on such grounds *but appeared generally and answered on the merits.* In his assignment of errors in the court of appeals he did not raise the question, but simply claimed the trial court erred in holding the plaintiff was entitled (generally) to mandatory injunction directing that plaintiff be permitted to complete his purchase. In his answer he did not question the jurisdiction of the court.

The suit was brought in equity and treated as an equitable suit from the start by both sides, and this Court has frequently held that in such an instance, either equitable or legal remedy may be administered as the facts require or warrant. In the Supreme Court of the District of Columbia such procedure is so authorized by rule; legal and equitable causes may be joined and appropriate relief awarded; and it is not for the Secretary-appellant to question the procedure of that *court of general jurisdiction.*

Under the rule of the common law, which governs the writ of mandamus, no review of the decision of the

Secretary could be had and his decision relating to the presumptive title of Utah, the rules of his department or the construction of the same could not be had by the common law writ.

Braffet had no remedy at law or by appeal and his only remedy was in equity, since the secretary-appellant held as a matter of law that Braffet was precluded by the canceled regulation from making an application to purchase, and that under a nonexistent regulation his application to purchase was a mere application to contest the claim of Utah. That was a ruling at law on undisputed facts. If he had found as a fact that Braffet was a qualified applicant, but through some extrinsic fact his application was without legal force, it well might be that mandamus would lie. Here the Secretary-appellant did not refuse to act, but acted erroneously through the exercise of his judgment and construction of a statute which was not merely ministerial, but which required a determination on his part as a fact that the land was known coal land on the date the grant attached to the State. He so found, and if he had stopped there mandamus would lie; but following his finding of fact he proceeded to act erroneously, and it is only by indirect review by mandatory injunction that the error may be reached *and the obstructions removed.* It may be that in Illinois or New Jersey the rule is different, but such is the rule of action in the only court of general jurisdiction having jurisdiction of the persons of the heads of executive departments, namely, the Supreme Court of the District of Columbia.

There has been some cursory expression by the Secretary-appellant that his decision is final and conclusive, since Section 2347, R. S., has been committed to him for administration; but hundreds of decisions of the courts hold otherwise. He can not bring this case within the rule announced in the Decatur and Rives cases. There is no bounty or gratuity here. Simply barter and sale; a fixed, valid, existent claim—or nothing. *Mandamus will require performance of duty to the extent of requiring decision to be made, but will not review a decision when made, which is the instance here.*

III.

Considerable stress was said on an excerpt from the Schurz case (102 U. S., 378), to the effect that while the title to the land remained in the United States and proceedings for acquiring it were yet *in fieri* the courts should not interfere to control the exercise of the power vested in the Department of the Interior; all of which is good law, but is not applicable here. The proceeding under the Braffet contest has been finally closed, and terminated, and as admitted by the appellant the appellee has exhausted the procedure of the Department, and can do nothing more there (R., p. 12).

It will require no argument to refute the claim that since the title to the land remains in the United States, suit may not lie against the appellant to compel him to perform his duty and to permit the appellee to complete his purchase.

It is true that if the proceeding had not been finally closed and was still alive in the Department, the courts

could not interfere except to compel appellant to proceed, etc.; but the cases are numerous and uniform that when the procedure of the Department is exhausted then the courts may review a decision of law that closed the proceeding to the prejudice of a qualified applicant and review the obstructions alleged made by appellant. Otherwise no mining locator, desert entryman, homesteader or other claimant under the laws of the United States could ever review by any judicial action an erroneous decision of law that deprived him of his statutory rights, and the decision of the Secretary-appellant would become final and conclusive on rulings of law as it is on findings of fact. No railroad grantee, no swamp land or school land claimant could ever review a decision of law that destroyed the various grants, and the scores of decisions of this Court utterly refute the illogical and erroneous contention of appellant in such regard. Here the appellant was not construing, and did not base his decision on a construction of, Section 2347, R. S., or of the school land grant or of a land law of the United States, but was construing and applying a *cancelled* rule of procedure that was not even applicable, in any event, to the subject-matter, and through that construction he *obstructed* the right of appellee to complete his purchase.

The grant to Utah was not a public land law that vested the construction of the same in the judgment and discretion of the appellant. It is like, in such regard, a swamp land act which the Court of Appeals of the District of Columbia in the case of O'Donnell *vs.*

Work (W. L. R., Vol. 54, p. 886) held was not a public land law and no discretion or judgment was vested in the appellant to administer except in ordinary routine, save in the single instance of passing on the mineral quality of the land; and the appellant did not seek review of that decision.

The *Rives case, 267 U. S., 175,* is not applicable here since there it was only held that where Congress had committed the administration of a statute to a Secretary, his erroneous construction of the same could not be reviewed by *mandamus,* since that writ could not operate as a writ of error, and the citations therein simply illustrate a well settled principle.

So it is with the citation by appellant of *Shepley vs. Cowan, 91 U. S., 330,* where it was simply held that until it was finally decided by the Secretary of the Interior that certain land was within or without the boundaries of a survey the courts could not interfere; all of which is conceded. But here the appellant had *finally* decided before the suit was filed.

IV.

Next appellant contends here, though the matter was not assigned as error in the courts below, citing Holt *vs.* Murphy, 207 U. S., 407-414, to the effect that no application to initiate a right under the laws of the United States will lie for a tract of land embraced in a *previous entry,* until the *entry* has been cancelled on the records of the local land office; and appellant seeks to apply that rule here by claiming that the presumptive title of Utah arising through the return of the

surveyor that the land was not mineral, was an *entry* on the records of the local land office that suspended the operation of Section 2347, R. S., until that entry was canceled on the records of the local land office; and hence the admitted acceptance of an application to purchase under Section 2347, R. S., was simply an application to contest the *entry* of the State; and if the contest was successful, no rights would accrue to the successful contestant! That is the flat position of the appellant based on his construction of a cancelled rule.

The legal meaning of the word "entry" is fully settled. It means an application to purchase public lands at private sale through the local land office under a public land law, with the sequence that when said application is accepted and entered on the records of the local land office it cannot subsequently be embraced in any other application to enter under any land law of the United States until the prior entry has been cancelled, but here the appellant seeks to dignify the unfounded claim of the State to *known coal lands* that were excepted from the operation of the grant by calling the unfounded, mythical and illegal claim an "entry" under the land laws of the United States. We submit the proposition is simply an anchor to the windward cast overboard in the wild hope that the anchor may drag in the kelp and save the drifting ship.

Such is the "forty year rule of practice" that appellant advances here, perfectly applicable in an instance where there is a previous uncancelled entry made under the land law of the United States on the local records

and where a subsequent applicant under the public land laws of the United States seeks to embrace in his application land embraced in a previous uncanceled entry. Then appellant, proceeding, claims that the application to purchase being merely an application to contest the *entry* of the State, no preference right would flow to the successful applicant because he was a coal applicant and not a preemptor, a homesteader or a timber culture applicant as defined by the Act of May 14, 1880, c. 89, sec. 2, 21 Stat., as amended by U. S. C. tit. 43, sec. 185. In *Stockley vs. United States* (*supra*), Mr. Justice Sutherland also discussed and defined the word "entry," citing *Chotard vs. Pope*, 12 Wheat., 586, 588, clearly showing the claim of Utah could not amount to an uncancelled entry in the records of the local land office.

It is admitted that no one contesting an entry made under a land law of the United States can secure a right of preference to enter in case of a successful contest in case of a homestead entry unless the contestant was a preemptor, a homesteader or a timber culture claimant; but the rule of the statute was limited to a contest of a previous uncancelled homestead entry. Appellant so admits in the *certiorari* application. (Brief, p. 19), but we were not seeking a preference right which is only allowable in an instance arising under sec. 2348 R. S.

Then, in sequence, appellant proceeds to argue that the application of Braffet was invalid, since the land was not "vacant" at the time the Braffet application became embraced in and covered by the uncancelled

entry of the State on the records of the local land office, and seeks to establish that the mythical entry of the State was the equivalent in law of a mining location, and cited the case of *Durnford vs. Fall, 285 Fed., 887* (D. C. Court of Appeals), where the court held that an application to purchase coal lands under Section 2347, R. S., would not lie where the lands were embraced in and covered by a previous uncancelled mining location. Various other similar cases are cited by appellant, but none of them even suggests that an unfounded claim constitutes an entry under the laws of the United States, and all of them are instances where a subsequent applicant sought entry and purchase of lands embraced in an uncancelled previous entry made in due form of law under any of the land laws of the United States; and until this Court holds that the mere return of the surveyor that the lands were not mineral constituted an entry on the records of the local land office under a land law of the United States, the appellant will be without authority to sustain his extraordinary contention.

The Court of Appeals Decision.

The court below held:

(1) Citing *United States vs. Sweet*, 245 U. S., 563, that no presumptive or any other sort of title passed to Utah under the grant to known mineral lands.

(2) That the rule of March 6, 1903, in any event, was not applicable, since the State, after being given

an opportunity to produce testimony to defeat the appellee, voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee. The Department has invariably so held in a score of cases that the withdrawal from a contest leaves the issue between the entryman and the United States. (See Appellee's Brief opposing *certiorari*, p. 23). Here the appellant claims he had the right to barter a lease of the lands in exchange for a conditional relinquishment of any claim of title by the coal lessee arising under the patent of the lands by Utah to the lessee.

(3) Next, the Court of Appeals held that where a citizen has submitted required proof of compliance with a public-land law and *his entry has been placed on record* (as here), he is vested with a presumptive title to the land, a title which precludes allowance of any other title so long as entry remains intact.

> "The title of the entryman is not absolute, however, but it is still subject to investigation and scrutiny; and if found for any reason to be invalid, it is liable to cancellation. But cancellation cannot emanate from thin air * * *. Thus it will be observed that by rule of practice established in the Department, and, indeed by the law as announced by the Court in many instances, the moment that Braffet's application for purchase was placed on record in the local land office, he acquired an interest that could not be divested in favor of any other claim so long as his entry remained intact."

This universal rule of the department and of the courts is not referred to by appellee. Individually he seeks to avoid it here by contending, despite the admissions he made by his accuser, that the application although accepted, was only a contest application, *i. e.*, was now accepted and could not be accepted by review of the cancelled regulation.

The court further held that the appellant, under Section 2 of the Leasing Act, which reads (and under which appellant executed the lease to the absent corporation).

> "That the Secretary is hereby authorized, in according leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants,"

had attempted to "barter" away the rights of Braffet under the said provision of the Leasing Act, which the Court of Appeals held was only applicable to contesting *applicants for a lease* in a lease proceeding where the application for a lease was contested by another leasing applicant. Here the appellant applied it to a coal lease applicant because that applicant was claiming under an *agricultural* patent for *known* coal lands! Still it was the basis of the barter, but the accuracy of the statement of the court below concerning the alleged basic proposition is not questioned. The Secretary-appellant was evidently of the impression that when application was made to lease coal land, etc., he could call in every claimant holding or

claiming under any public-land law and dispose of their claims and titles on the application of a person that sought to lease their respective holdings!

In fact, no portion of the opinion of the learned Court of Appeals is attacked by appellee, except the passing suggestion that the court refused or neglected to hold that under a *cancelled and defunct* regulation it was the duty of the Secretary to hold that the application to purchase was merely an application to be permitted to contest the mythical entry of the State.

The court below held squarely that the lease and the Leasing Act, like the flowers that bloom in the spring, have nothing to do with the case, and the appellant only contends in connection with his proposition that the Leasing Act wiped out the application of Braffet because it was not a vested right, while this Court held in the Stockly case that any claim which in due course would ripen into a vested right was within the exception of the Leasing Act, and the court below held the application of Braffet was such a claim and that he was entitled to perfect it.

The attempt of the appellant to bring this case within the citations made in the Rives case, beginning with United States *ex rel.* Ness *vs.* Fisher, cannot be sustained. Those cases simply held, regulation or no regulation, that an erroneous decision could not be reviewed by mandamus; and, even if we admit that the erroneous construction by the appellant of any statute committed in its administration to his judgment and discretion cannot be reviewed by the courts, still, the case is not here. If the Secretary had held that the

applicant was not a qualified citizen, or that the land was not coal land, etc., then his decision would be final. But here he denies the statutory right to purchase through the error of holding that a cancelled rule controlled his action.

We submit the rule is this, namely: That a decision of law arising on undisputed evidence is in no sense conclusive on the courts, but is subject to review, and any action of the department based on a misconstruction of the law can be corrected by the courts.

The decisions of this Court are so numerous sustaining the rule it would be trite to cite more than one or two. In Wisconsin Cent. R. R. *vs.* Forsythe, Mr. Justice Brewer (159 U. S., 46), said:

> "But further, it is urged that this question of title has been determined by the land department adversely to the claim of plaintiff. This is doubtless true, but it was so determined, not on any question of fact, but on the construction of the law; and such matters we have repeatedly held are not concluded by the decision of the land department." (Citing numerous cases.)

The defendant admitted in his answer that in July, 1903, the General Land Office classified the land as coal land (ans. R., 6) which classification was in force at the time the appellee made his application to purchase. We submit that such classification was a *prima facie* determination that the land was open to purchase under Section 2347 R. S., and warranted the application to purchase, and in that connection it must be noted that the appellant did not allege in his an-

swer or claim in the courts below that the return of the surveyor was true or entered on the records of the local land office, or that such uncancelled entry appeared on the records of the local land office at the time of Braffet's application.

The only allegation in the answer (R., p. 11) is that the land had been surveyed and returned as non-mineral, but the appellant did not intend the return was true and, as first held it was not true.

Time and time again it has been held by the Department of the Interior and by the courts that a return of a surveyor that land is mineral or non-mineral is merely a notation in the field notes of a survey that has no binding effect. The Department never held, nor did any court ever hold, that a mineral return by a surveyor precluded a subsequent agricultural entry under the laws relating to pre-emption, homesteads, etc.; and neither the Department nor any court ever held that a non-mineral return by a surveyor precluded an entry under the mining law; and no court (nor the Department) ever held that a return by a surveyor that the land was mineral or non-mineral, was an entry in the local land office, and differentiation may not arise because the land returned was a section of land embraced in a school land grant.

Our brief opposing *certiorari* contains the authorities bearing on the subject of appropriation of known mineral school sections, and they are overwhelmingly that a mineralized school section is open to appropriation under the mining laws, although the land had been returned as non-mineral by the surveyor;

but, the appellant necessarily must contend otherwise, or his argument goes over the rail, since if the insignificant return was not an entry by Utah (or its legal equivalent in suspending the operation of the coal laws) then his last contention is forever gone. Perhaps that contention is the base of his argument that it has been a rule of practice for 40 years!

Outside of authority and citations it is very clear that such mere return could not be an entry (or its legal equivalent) since entries can only be made by citizens under a public-land law of the United States.

Under no law could Utah make an entry in the local land office.

The school land grant to Utah required no administration in the general or local land offices.

Here the grant passed all designated sections to the State on the date of a survey showing the section was non-mineral *unless* it was an excepted known coal-land section. If it was known coal land at the date of the grant, it could not pass to Utah even if the surveyor returned it as non-mineral. Land known to be coal land could not pass under the grant. If the surveyor's return created the presumption that the land was not within the exception of the grant, it is clear the presumption could not suspend the operation of the coal-land laws if, in fact, the land was known coal land. On this appellant pegs his point, that an entry or an application to purchase known coal lands could not be made until he determines that they were known coal lands, and that he only makes such a determination in an ap-

plication to contest the agricultural entry of the State, and although he upheld the contestant, still that person could have no right of preference, since under the homestead act of May 14, 1880, such preference rights accrued only to pre-emptors, homesteaders and timber-culture entrymen, and since Braffet was neither, no rights flowed to him.

Such contention necessarily leads him to follow his false premise that he could not determine the validity of the *claim* of Utah, the entry of Utah, until some competent person entered a contest against the entry of the State under *the said nonapplicable act of May* 14, 1880, and that therefore the application that Braffet made under Section 2347, R. S., to purchase known coal land (and which the appellant admitted in his answer, was known coal land) would be treated as a contest under the act of May 14, 1880, and would further be denied any rights by reason of the defunct regulation, and that by reason of "equitable consideration" he immediately leased the land to a participating contestant of Braffet's rights, *on the ground that it was known coal land prior to the time the grant attached.* No wonder the court of appeals spoke harshly of the Secretary of the Interior.

The foregoing views are augmented and enhanced by the unqualified admissions the appellant makes in his answer. Nowhere therein does he deny the positive allegations set forth specifically in the bill of complaint that Braffet duly applied "to purchase the following-described known coal lands, and known as such on the date of admission of the State of Utah, etc.

(R., p. 2, par. 3 of bill). In his answer (R., p. 11, par. 11) he alleges that whether or not Section 32 was excepted from the grant depends entirely whether the land was known as coal land when the grant became effective, but whether the land as a fact was known to be mineral at the time the grant attached *was an immaterial issue,* by reason of the fact that it had been identified by public survey and had been returned as non-mineral, and that then and there, *prima facie,* a good title vested in the State and was not appropriable public land, unless and until, on proceedings duly had, in a contest proceeding under the Act of May 14, 1880, to which Utah and her privies were parties, it was found and determined by the Land Department that the land was known mineral land on the date the grant attached, and until such decision the land was "not vacant" coal land not otherwise appropriated or reserved, nor could anyone acquire a vested right by any entry or application to enter under public-land laws, which is only an additional claim that the return of the surveyor was an entry by Utah under a public-land law which precluded the operation of the coal-land law until the Utah entry was canceled on the records of the local land office. The coal land sale act became effective March 3, 1873, and related exclusively to the sale of *coal* lands. The Act of May 14, 1880, was confined exclusively to preempture homestead and timber culture entries and limited the contestant there to persons qualified to make such entries and thereby to secure the right of perpetual entries. It is simply absurd to claim that the second act was or is applicable

to a person seeking to make a coal entry under Section 2347 R. S.!

That such a proceeding followed the application of Braffet is the conceded fact; but the legal result of the proceeding was utterly destroyed by the legal error of appellant in holding that, although Braffet had established his case, his application was simply an application to contest the entry of Utah, but since the homestead law of May 14, 1880 (*supra*), limited the right of contest of antecedent homestead entries to pre-emptors, homesteaders and timber-culture entrymen, no preference right to Braffet arose, the only result being to destroy the presumptive title of Utah and her privies; and since Braffet had no vested right, the land reverted to the public domain and subject to disposition under the Leasing Act; and thereon the learned Secretary of the Interior leased the land to the agricultural contestant, the Pleasant Valley Coal Company, on the ground that the land was *known coal land* at the time of the grant to the State! Comment is unnecessary. And the further fact is set forth in the answer that before the contest proceeding in the Land Department had terminated, the agricultural claimant applied for a lease on the ground that the land was known coal land at the time of the grant, and offering to "barter" its invalid and nugatory claim as patentee of Utah in exchange for a lease of Section 32!

The only reference to an application to a cash entry under Section 2347, R. S., in the coal land regulations (*infra*) is that it shall be subject to a valid adverse right; and up to this time the appellant has not con-

tended that the claim or assertion of Utah was a *valid adverse right,* but was simply an undetermined claim of a right.

Rule 1 of practice of the Land Department is the only regulation relating to contests; and it provides only

> "contests may be initiated by an adverse party or other person against a party to an entry, filing or other claim under laws of Congress relating to the public lands."

It is obvious that the regulation did not relate, as claimed by the appellant in the Court of Appeals, to an application to purchase coal lands under Section 2347, R. S., and such view becomes established when we examine the Act of March 3, 1909 (35 Stat., 844), which provides that an agricultural claim, like that of Utah and its alleged lessee, who has in good faith located, selected or entered under *the nonmineral laws* of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal, may receive a patent therefor, reserving the coal deposits to the United States.

Subsequent to this Act, Section 32 was classified as coal; and neither Utah nor its privies protested the application, and subsequent to the classification Braffet made his application.

It may be claimed that the classification being after the grant it was only a "subsequent discovery," which did not disturb the grant to the State; but the fact should be remembered that appellant, in his answer,

admitted the lands were known coal lands on admission day, and further admitted had been classified by the Department of the Interior as coal lands prior to Braffet's application.

The attempt of the appellant to bring within Rule 1 of Practice the application of Braffet is based on the canceled paragraph of the rule of March 6, 1903, which said:

> "Applications presented under the mining laws covering parts of a school section *will be disposed of in the same manner as other contest cases,*"

and, *ergo,* the general rules of practice controlled; and since those rules gave no rights to a successful contestant unless he was a pre-emptor, homesteader or timber-entry claimant contesting an agricultural entry, Braffet therefore gained nothing by his contest. Assuming, for the moment, the paragraph so provided, what became of it when later, and before the Braffet application, this paragraph was substituted in its stead, namely:

> "Claims of parties based upon mineral *locations* covering parts of a school section, asserting that the same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the *mining law* are presented."

While even this amendment did not relate to Braffet's application any more than did the canceled para-

graph, it clearly shows the absurdity of the claim that the canceled paragraph controlled the situation.

Concerning the Canceled Regulation.

We submit, that in any event, if the regulation relied on by the Appellant was in operation, as he claims in his answer, on the date of Braffet's application, it was nugatory and void, as it suspended the operation of Section 2347 R. S.

It is finally settled that a regulation of the land department must be appropriate and such regulations must be reasonable and lead toward the enforcement of the statute; and the land department is not authorized to adopt rules and regulations which are destructive of rights conferred by Congress or to annex conditions or provisions to the law. Williamson *vs.* United States, 207 U. S., 425.

It will be noted here that the application of Braffet was made under Section 2347 R. S., and that the authority of the land office to make rules and regulations is defined by Section 2351 R. S., and pursuant to such direction, and on April 12, 1907 (35 L. D., 665), the land department adopted the following regulation:

> "Sec. 22. An application for cash entry (as here) will be subject to any valid adverse right which may have attached to the same land pursuant to Section 2348 R. S."

It is clear that *no* regulations of the land department referred to applications made under *Section 2347 R. S.*

Section 2348 R. S. only refers to persons who had settled on or had made improvements on or had *discovered* coal on the land and to such persons a preference right of entry under *Section 2347 R. S.* was given.

Section 25 provides that the rules of practice of the general Land Office will, as far as applicable, govern all cases and proceedings providing for the sale of coal lands.

These duly promulgated regulations were made subsequent to the canceled regulation, which, as we have seen, related solely *to indemnity selections by the State.*

The practice in an instance to enter a claimed mineral school section was passed on by Secretary Hitchcock in Dakota *vs.* Walsh, 34 L. D., 723, where he held that a mining entry could not be allowed on such a section unless the State had had an opportunity to contest the application, and in a proceeding following it was for the applicant to establish (and not the State) the quality of the land at the time the grant attached; and Braffet did so in his proceeding.

Lindley on Mines (3d ed., sec. 679), commenting on the above case and its citations, holds that when the mineral applicant has established the mineral quality of the land at the time the grant attached, and in the face of a non-mineral return by the surveyor (and the State has had notice), the force of the surveyor's return is destroyed, the government will deal with the land the same as any other public mineral land.

Another point we strongly urge is that the Secretary did not have the right to make and promulgate the

canceled rule under either Section 2347 R. S., or under the school land grant to Utah, and therefore it is nugatory.

Its history clearly and conclusively shows, as well as its preamble, or enacting clause, that it was designed to carry into effect the Act of February 28, 1891 (26 Stat., 786, as amended by Act of May 3, 1902; 32 Stat., 188), both being indemnity acts and made applicable to Utah by the latter act. The last paragraph of the regulations of March 6, 1903 (32 L. D., 44), reads as follows:

> "These instructions are in lieu of and to take the place of the regulations on this subject of May 27, 1891 (24 L. D., 548), in so far as those regulations deal with the question of mineral lands involved in school indemnity selections; and all previous regulations in conflict herewith are hereby set aside."

Turning to 24 L. D., 548, we find that the regulations related solely to selections of land in the states of Montana, North Dakota, South Dakota and Washington under grants to said states, which act has been extended to the State of Utah.

The further point is that neither the regulations of May 27, 1921, March 6, 1903, or January 10, 1906, or the above acts were applicable to an application to purchase lands under Section 2347 R. S., but were in each instance applicable only to an instance where the State attempted to make an indemnity selection tendering a mineralized school section as the base for the indemnity selection; and, further, the Secretary had not the

legal right to apply such a rule to the coal land law which did not authorize such regulations.

Conclusion.

Finally, we urge that no interest of the United States or of the alleged lessee will be adversely affected by affirmance here. At best the alleged lease has only a basis growing out of a public land law, the mineral leasing act, and its right thereunder, if any, is to be determined by the courts of the land of the venue.

This proposition was distinctly laid down in *Shulthis vs. McDougall*, 225 U. S., 561, where is was stated:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws; for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law upon the determination of which the result depends. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. * * *"

As was said in *Blackburn vs. Portland Gold Mining Co.*, 176 U. S., 571,

> "A controversy in respect to lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an Act of Congress."

Here Braffet is asserting his right under Section 2347 R. S., and the appellant is denying that right, not under any law of the United States, but under a construction of a nonapplicable cancelled regulation of his department; and surely, we urge, the *certiorari* procedure was not designed for such an instance.

If it be contended that both parties are claiming under different laws of the United States, the first answer is that only one of the parties is before the court, and the second answer is *Norton vs. Whiteside*, 239 U. S., 154. There both parties claimed under laws of the United States, and this Court held that fact in no way changed the situation or affected the rule laid down in *Blackburn vs. Gold Mining Co.* (*supra*) and in the other cases cited in the decision. And it must be noted that the decree of the trial court (R., p. 14) expressly stated, "No right of said Pleasant Valley Coal Company shall be affected by this decree."

Chief Justice Marshall in *Cohen vs. Virginia*, 6 Wheat., 379, said:

> "(a case) may truly be said to arise under the construction of a law of the United States whenever its correct decision depends on the construction of either,"

or (*Osborn vs. Bank*, 9 Wheat., 822) when the title or right set up by the party may be defeated by one construction of the constitution, or sustained by the opposite construction of the Constitution or law of the United States.

What is there properly before the Court?

First, only the construction of a cancelled, nonapplicable regulation on which the entire defense is based; second, the nature of the remedy, possibly.

We say possibly, because on taking his appeal to the learned court below, appellant did not designate the subject as error (R., p. 15), and nowhere in the answer was there reference to the subject.

Concerning the subject of mandatory injunction, the appellant only said (R., p. 15) in his assignments of error, that the court erred in holding that a mandatory injunction should issue directing appellant to vacate his decision of July 31, 1922, and to affirm in all respects the former decision of the Commissioner of the General Land Office, and requiring him to declare Braffet's petition to be valid, etc., and the court below modified the decree accordingly.

The appellee suggests that since the court below reversed the decree of the trial court and remanded the same to the court below for the entry of a new decree that the application for certiorari was premature and that the proper practice required the case to be remanded and a decree entered in accordance with the decision of the court below, and then if dissatisfied, the appellant could pursue his appeal from that point, if such remedy existed.

We respectfully submit the decree of the court below should be affirmed.

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